

**IN THE UNITED STATES DISTRICT COURT FOR  
THE EASTERN DISTRICT OF PENNSYLVANIA**

**JO ELLEN ESPOSITO**

**v.**

**KENNETH S. APFEL,  
Commissioner of the Social Security  
Administration**

**CIVIL ACTION**

**NO. 99-771**

**MEMORANDUM**

**Broderick, J.**

**February 24, 2000**

Plaintiff Jo Ellen Esposito ("Esposito" or "Plaintiff") brings the instant action pursuant to 42 U.S.C. §§ 405 (g) and 1383(c)(3) seeking judicial review of the final decision of the Commissioner of the Social Security Administration ("Commissioner") which denied her applications for disability insurance benefits ("DIB") and Supplemental Security Income ("SSI") under Titles II and XVI of the Social Security Act ("Act"), 42 U.S.C. §§ 401-433, 1381-1383f. The parties filed cross motions for summary judgment which were referred to Chief United States Magistrate Judge James R. Melinson for a report and recommendation pursuant to 28 U.S.C. § 636(b)(1)(B). Presently before the Court are Plaintiff's objections to the January 7, 2000 report of Chief Magistrate Judge Melinson recommending that summary judgment be granted in favor of the Defendant Commissioner and against Plaintiff Esposito. For the reasons stated below, the Court will approve and adopt Chief Magistrate Melinson's report and recommendation, deny Plaintiff's motion for summary judgment, and grant Defendant's motion for summary judgment.

## **I. FACTUAL BACKGROUND**

The factual and procedural background of this case is detailed in Chief Magistrate Judge Melinson's report and recommendation and in Plaintiff's motion for summary judgment. The Court will, therefore, merely give a brief summary of the record. Esposito alleges that she is disabled based on Chronic Fatigue Syndrome ("CFS") and emotional distress. She alleges that she suffers from headaches, extreme fatigue, sore throats, muscle weakness, joint pain, forgetfulness, confusion, an inability to concentrate, and difficulty sleeping. She alleges that these symptoms began in November, 1991 and caused her stop working on February 12, 1992. Esposito tested positive for the Epstein-Barr virus on February 26, 1992. She also alleges that she suffers stress and anxiety over her son's murder in the late 1980s and additional stress and anxiety caused by her fear of developing breast cancer and her fear of having a heart attack. Esposito has not worked since February 12, 1992.

Esposito filed an application for DIB and SSI based on her CFS on June 24, 1993 seeking benefits from the date she stopped working in February of 1992. Her application was denied initially and on reconsideration. Esposito filed an untimely request for a hearing on July 28, 1994 and well as new applications for benefits in August and September, 1994. A hearing was held before Administrative Law Judge ("ALJ") Gerald J. Spitz on January 5, 1996. At that time, ALJ Spitz found that Esposito had good cause for her late hearing request and allowed her to proceed on her 1993 applications. At the hearing, Esposito was represented by counsel and testified before ALJ Spitz, as did a vocational expert ("VE"). ALJ Spitz rendered a decision on June 3, 1996 denying Esposito benefits because he found that, although Esposito had a combination of impairments which were severe, Esposito retained the residual functional

capacity to return to her previous employment. The Appeals Council declined Esposito's request for review, rendering the ALJ's decision the final decision of the Commissioner. The instant action followed.

After filing the instant action, Esposito filed another application for SSI benefits on May 21, 1998. This application was granted based on a Senior Attorney's determination that the records of her psychiatric treatment, beginning in July, 1997, demonstrated that she was unable to work due to major depression and post-traumatic stress disorder. The instant action concerns only Esposito's 1993 application for benefits.

## **II. DISCUSSION**

The Court conducts a de novo review of the portions of the Magistrate Judge's report and recommendation to which specific objections have been filed. 28 U.S.C. § 636(b)(1)(C); Fed. R. Civ. P. 72(b). This Court's review of the Commissioner's final decision is "limited to determining whether that decision is supported by substantial evidence." Hartranft v. Apfel, 181 F.3d 358, 360 (3d Cir. 1999). See also 42 U.S.C. § 405(g). Substantial evidence "does not mean a large or considerable amount of evidence, but rather such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Hartranft, 181 F.3d at 360 (quoting Pierce v. Underwood, 487 U.S. 552 (1988)) (internal quotations omitted). This Court "will not set the Commissioner's decision aside if it is supported by substantial evidence, even if we would have decided the factual inquiry differently." Hartranft, 181 F.3d at 360. The Court "cannot conduct a de novo review of the Commissioner's decision or re-weigh the evidence of record." Palmer v. Apfel, 995 F. Supp. 549, 552 (E.D.Pa. 1998) (citing Monsour Med. Ctr. v. Heckler,

806 F.2d 1185, 1990 (3d Cir. 1986), cert. denied, 482 U.S. 905 (1987)). The Court "is bound by the ALJ's findings of fact if they are supported by substantial evidence in the record." Plummer v. Apfel, 186 F.3d 422, 427 (3d Cir. 1999).

To be eligible for benefits under the Act a claimant must demonstrate that she is under a "disability," which the Act defines in relevant part as an "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment." 42 U.S.C. § 423(d)(1)(A). The Social Security Administration's regulations ("the administrative regulations") provide a five step sequential evaluation process for determining whether a claimant suffers from a "disability." See 20 C.F.R. § 404.1520. The United States Supreme Court has aptly summarized the process as follows:

The first two steps involve threshold determinations that the claimant is not presently working and has an impairment which is of the required duration and which significantly limits his ability to work. In the third step, the medical evidence of the claimant's impairment is compared to a list of impairments presumed severe enough to preclude any gainful work. If the claimant's impairment matches or is "equal" to one of the listed impairments, he qualifies for benefits without further inquiry. If the claimant cannot qualify under the listings, the analysis proceeds to the fourth and fifth steps. At these steps, the inquiry is whether the claimant can do his past work or any other work that exists in the national economy, in view of his age, education, and work experience. If the claimant cannot do his past work or other work, he qualifies for benefits.

Sullivan v. Zebley, 493 U.S. 521, 525 (1990). The claimant bears the burden of proof as to the first four steps but, if the claimant is unable to resume her former occupation, the "burden of production shifts to the Commissioner, who must demonstrate the claimant is capable of performing other available work in order to deny a claim of disability." Plummer, 186 F.3d at 428. "The ALJ must show that there are other jobs existing in significant numbers in the national economy which the claimant can perform, consistent with her medical impairments, age,

education, past work experience, and residual functional capacity." Id.

Applying the sequential analysis described above, ALJ Spitz made the following findings:

1. The claimant met the disability insured status requirements of the Social Security Act as of the alleged onset date of disability of February 12, 1992, and continues to meet those requirements through March 31, 1996.
2. The claimant has not engaged in substantial gainful work activity since the alleged onset date of disability of February 12, 1992.
3. The medical evidence establishes that the claimant's impairments, considered in combination, are severe.
4. The claimant does not have an impairment, or combination of impairments, severe enough to meet or equal the requirements of any of the listed impairments set forth in Appendix 1, Subpart P, Social Security Administration Regulations No. 4.
5. The claimant is currently a 50 year old younger [sic], who was age 46 at alleged onset date, with a limited 10th grade education, whose past relevant work was essentially light in exertional requirements.
6. The claimant has the residual functional capacity to perform light work.
7. The claimant has the residual functional capacity to perform her past relevant work.
8. The claimant has not been under a "disability" as defined in the Social Security Act, at any time since the alleged onset date of disability of February 12, 1992.

Record ("R.") at 35-36. Esposito challenges the ALJ's conclusion that her CFS was not disabling, arguing that the ALJ failed to follow the Commissioner's policies regarding evaluation of CFS claims. Esposito also challenges the ALJ's decision to discount the reports of her treating physician which, she alleges, establish her disability. She further challenges the ALJ's determination that her subjective complaints concerning her symptoms were not fully credible. Esposito also challenges the ALJ's determination that her mental impairments were not severe. Finally, Esposito challenged the ALJ's determination that she could return to her past relevant work and argues, instead, that her residual functional capacity, age, education, and work experience mandate a finding of disability under the Act.

Chief Magistrate Judge Melinson reviewed the record as well as the arguments raised by Esposito and the Commissioner in the motions for summary judgment and concluded that the ALJ's findings were supported by substantial evidence in the record. Specifically, Chief Magistrate Melinson determined that ALJ Spitz properly considered the medical records and the opinions rendered by Dr. Eric Von Kiel, Epstein's treating physician from May 13, 1993 to June 1, 1994, in determining that the highly restrictive opinions rendered by Dr. Von Kiel, which were provided on form reports with no narrative explanation and which were merely a "recitation of Esposito's own subjective complaints," should not be given great or controlling weight. Report and Recommendation ("R&R") at 10-11. Chief Magistrate Melinson also rejected Esposito's claim that the ALJ improperly analyzed her CFS claim in determining she was not disabled. R&R at 11-12. Chief Magistrate Melinson found that the ALJ's determination that Esposito's CFS was not disabling was supported by substantial evidence and based on a proper legal analysis. R&R at 11-12. Chief Magistrate Melinson next found that the ALJ's determination that Esposito's mental impairments were non-severe was supported by substantial evidence in the record. R&R at 14. Chief Magistrate Melinson then found that the ALJ properly found that Esposito could return to her past relevant work and rejected Esposito's claim that a finding of disabled was mandated by her residual functional capacity, along with her age, education and work experience. R&R at 15-16. Finally, Chief Magistrate Melinson found that the ALJ provided the requisite clear and reasonable basis for his finding that Esposito's testimony regarding her subjective complaints was not fully credible. R&R at 18. Chief Magistrate Melinson therefore recommended that the decision of the Commissioner be upheld, Plaintiff's motion for summary judgment be denied, and the Commissioner's motion for summary judgment

be granted. R&R at 18.

Esposito objects to Chief Magistrate Melinson's report and recommendation on the basis that it "suffers from the same errors as the underlying administrative decision under review." Objections ("Obj.") at 1. Esposito asks that the her motion for summary judgment be granted and the Commissioner be directed to pay disability benefits to her or that this action be remanded for a new hearing. Esposito asks that, if her motion for summary judgment is denied, this action be remanded to the Commissioner for reconsideration in light of the new evidence concerning Esposito's deteriorating mental condition which led to the award of benefits on her 1998 application.

The Commissioner has not objected to the Report and Recommendation but has filed a response to Plaintiff's objections. The Commissioner contends that the decision of the ALJ was supported by substantial evidence, as Chief Magistrate Melinson correctly found, and, therefore, the Report and Recommendation should be approved and adopted, Plaintiff's motion for summary judgment denied, and the Commissioner's motion for summary judgment granted. The Commissioner objects to a remand for consideration of new evidence, arguing that evidence of Esposito's treatment for psychological problems beginning in July, 1997 is not relevant to the issue of whether or not Esposito was disabled on or before March 31, 1996 when her insured status expired.

Because Esposito has objected generally to the Report and Recommendation, the Court has made a de novo review of the entire record in order to determine whether or not the ALJ's decision was supported by substantial evidence. The Court notes that the Commissioner has no burden to disprove a claimant's testimony or show that she is not disabled because the burden is

always on the claimant to prove her medical condition and functional limitations. See Torres v. Schweiker, 682 F.2d 109, 111 (3d Cir. 1982). In making the determination as to whether or not the claimant has established that she is under a disability, the Commissioner may rely on what the record says as well as what the record does not say. See Diaz v. Shalala, 59 F.3d 307, 315 (2d Cir. 1995).

Esposito testified at the hearing before ALJ Spitz on January 5, 1996 as follows: Her last job was as a receptionist. R. at 60. Prior to that, she had worked as a bar manager, at supermarkets and delis, and in mobile home sales. R. at 60, 82-84. She stopped working as a receptionist in 1992 because she was constantly getting sick and was extremely tired so her boss would tell her to go home. R. at 61. She was having trouble staying awake and actually fell asleep at her desk. R. at 88. Eventually, her boss suggested that she stay home for a while and she never went back. R. at 76-77. She was told around that time that she had the Epstein Barr virus, but there was nothing that she could do about it other than rest because there was no cure. R. at 61-62. She has headaches "just about constantly" for which she takes Motrin and Esgic. R. at 63. "Quite a few days a week" she spends the day in bed or just laying on the couch because of the headaches and extreme fatigue. R. at 65. She always has "a low grade sore throat, which every few days turns into either a major sore throat or a cold or a flu" so she's "usually sick most of the time." R. at 65. Her legs get really weak and rubbery. R. at 65. Her joints ache, especially her hands, for which she takes Motrin or arthritis formula buffered aspirin. R. at 66. She wakes up several times a night and is always exhausted. R. at 66-67. Her memory has also deteriorated. R. at 68. She does not usually drive out of concern over her reflexes failing because her head does not function properly as a result of not getting enough sleep. R. at 74.



She does not do much shopping and only shops at a small store, accompanied by her daughter, because of the weakness in her legs. R. at 65. She does not have any hobbies or go out to even see a movie because she does not feel comfortable driving that far. R. at 79. Her daughter drives her to get her welfare check and takes her to the bank. R. at 86. Her son and daughter do the cooking and cleaning and household chores because, even though she tries to help, she usually just winds up sitting down. R. at 75-76. Her mother also comes over and helps her. R. at 76. She has to take her time in order to take care of her personal needs and some days she does not shower or get dressed. R. at 85. She has also been diagnosed with a prolapsed valve and suffers from shortness of breath. R. at 69. This causes her to suffer stress because she has a family history of heart disease and believes that her risk of a heart attack is very high. R. at 72. She also suffers a lot of stress because her mother died of breast cancer and Dr. Espinosa recently told her that she had developed a higher risk of developing breast cancer because of the five operations she has had in the past two years on both of her breasts. R. at 69. Each time she finds a lump, it takes about two months of testing and investigation before she has the surgery and gets the biopsy results. R. at 70-71. She also suffers anxiety over the murder of her son about seven years ago. R. at 80. She takes Xanax and Mafranta [ph.] for her nerves. R. at 75. She also takes sleeping medication. R. at 80. As a result of all this, she has lost about thirty pounds. R. at 73. She could not return to working as a bartender because of the pain in her hands and not being able to lift the cases of beer and her legs not being able to handle all the walking and standing. R. at 77. She could not return to working as a receptionist because of her failing memory, lack of a clear head, and the pain in her hands. R. at 77.

Initially, the Court finds that ALJ Spitz's finding that Esposito's testimony concerning her

impairments is not entirely credible is supported by substantial evidence in the record. It is the responsibility of the ALJ to determine the credibility of witnesses and weigh the evidence presented. See Richardson v. Perales, 402 U.S. 389, 401 (1971). ALJ Spitz determined that Esposito's testimony that she was completely disabled due to constant headaches, sore throats, leg weakness, joint pain, sleep disturbances, memory problems and stress which cause her to stay in bed all day was not fully credible. R. at 34. Although ALJ Spitz found that Esposito suffered from impairments which, taken in combination, were severe, the ALJ found that Esposito's testimony concerning the extent of her limitations was not credible in light of the medical evidence in the record. R. at 34-35. Esposito's complaints can be loosely categorized as complaints of fatigue, complaints of pain, and complaints of anxiety.

In determining whether a claimant is disabled, the ALJ must consider subjective complaints by the claimant and evaluate the extent to which those complaints are supported or contradicted by the objective medical evidence and other evidence in the record. 20 C.F.R. §§ 404.1529(a). Subjective complaints must be seriously considered, whether or not they are fully confirmed by the objective medical evidence. See Smith v. Califano, 637 F.2d 968 (3d Cir. 1981). The ALJ may reject such a claim, however, where he affirmatively addresses the claim in his decision, specifies his reasons for rejecting it, and has support for his conclusion in the record. See Capoferri v. Harris, 501 F. Supp. 32, 27 (E.D.Pa. 1980), aff'd, 649 F.2d 858 (3d Cir. 1981); Atkins v. Bowen, 690 F. Supp. 383, 389 (E.D.Pa. 1988). As the finder of fact, the ALJ can reject, partially or fully, subjective complaints if he finds them not credible based on other evidence in the record. See Baerga v. Richardson, 500 F.2d 309, 312 (3d Cir. 1974). The ALJ is empowered to evaluate the credibility of witnesses and his determination is entitled to deference

by this Court.. See Van Horn v. Schweiker, 717 F.2d 871, 873 (3d Cir. 1983).

As to Esposito's complaints of pain, an ALJ may discredit a claimant's complaints of pain where there is contradictory evidence in the record and the ALJ explains his basis for doing so. See Mason v. Shalala, 994 F.2d 1058, 1067 (3d Cir. 1993). Pain is a disabling factor only when it is so severe that it precludes a person from working so the fact that the claimant cannot work without pain does not necessarily mean that she is disabled. See, e.g., Cancel v. Harris, 512 F. Supp. 69 (E.D.Pa. 1981). In assessing complaints of pain, an ALJ considers such factors as the daily activities of the claimant, the frequency and duration of the pain, and the type of treatment, including medication, the claimant receives to alleviate the pain. Soc. Sec. Ruling 96-7p, 20 C.F.R. § 404.1529. An ALJ is entitled to draw an inference adverse to the claimant from the fact that the claimant has not sought medical assistance to relieve the professed pain. See Mason v. Shalala, 994 F.2d 1058, 1068 (3d Cir. 1993).

In determining that Esposito's subjective complaints were not fully credible, ALJ Spitz relied on several pieces of evidence. The ALJ stated:

The undersigned finds the claimant's subjective complaints and limitations to be not fully credible. The record indicates that the claimant has mild fibrocystic changes and has had several surgical procedures; however, there is no definite evidence of breast carcinoma (Exhibit 26). While this could reasonably be expected to cause her stress, the record does not indicate this is of a disabling nature. She is receiving no psychological counseling or treatment. She has complained of chest pain; however, this is not of a cardiac nature, as reflected by echocardiograms, Holter monitoring, stress tests, and physical examinations. The record shows her hypertension has improved (Exhibit 25). The claimant has complained of various musculoskeletal complaints, but the record does not substantiate these complaints.

R. at 34-35.

The Court finds that the ALJ has adequately explained his decision to regard Plaintiff's

testimony concerning the severity of Plaintiff's symptoms as not entirely credible. See Cotter v. Harris, 642 F.2d 700, 705 (3d Cir. 1981). Looking at all the evidence in the record, in light of the standard of review employed by this Court, the Court also finds that ALJ Spitz's determination that Esposito's subjective complaints were not entirely credible is supported by substantial evidence. This Court's review of the ALJ's findings must be based on the administrative record as a whole and, therefore, this Court may rely on any evidence in the record, whether or not it is cited in the Commissioner's final decision. See Richardson v. Perales, 402 U.S. 389, 401 (1971); Walker v. Secretary of Health and Human Servs., 884 F.2d 241, 245 (6th Cir. 1989).

The Court further finds that ALJ Spitz's decision to not rely on Dr. Von Kiel's statements in August 1993 that Esposito was unable to work at all due to her physical limitations was supported by substantial evidence in the record. Although the treating physician's opinions should be accorded great weight, the Commissioner and the ALJ are not bound by the physician's conclusion of disability and may reject it if insufficient clinical data supports it. See Newhouse v. Heckler, 753 F.2d 283, 286 (3d Cir. 1985). An ALJ "may afford a treating physician's opinion more or less weight depending on the extent to which supporting explanations are provided." Plummer v. Apfel, 186 F.3d 422, 429 (3d Cir. 1999) (citing Newhouse v. Heckler, 753 F.2d 283, 286 (3d Cir. 1984)). Form reports which only require a physician to check a box are weak evidence at best. See Mason v. Shalala, 994 F.2d 1058, 1065 (3d Cir. 1993). Where the form reports are unaccompanied by thorough written reports, their reliability is suspect. See Brewster v. Heckler, 786 F.2d 581, 585 (3d Cir. 1986).

ALJ Spitz found that Dr. Von Kiel's statements that Esposito was unable to work were

based entirely on Esposito's subjective statements as to her degree of fatigue and other symptoms. R. at 34. The Medical Source Statement completed by Dr. Von Kiel dated August 12, 1993 itself states that the "supportive medical findings" for each limitation which Dr. Von Kiel authorized are "subjective." R. at 184-185. ALJ Spitz discredited Esposito's subjective complaints and therefore could accord less weight to Dr. Von Kiel's conclusions based on them. Similarly, the Medical Assessment Form completed by Dr. Von Kiel on August 12, 1993 provides no basis for Von Kiel's conclusion that Esposito was incapacitated. R. at 235. Rather, the form merely lists a primary diagnosis of chronic fatigue syndrome and secondary diagnoses of "HTN," anxiety, and headaches. R. at 235. The sections of the form regarding medications for each condition and functional limitations are blank. R. at 235. ALJ Spitz also found that the last report of treatment from Dr. Von Kiel was on June 1, 1994, eighteen months prior to the hearing. R. at 34. Although Esposito testified at the hearing that she was receiving medical treatment for her CFS symptoms at that time from a Dr. Warren, Esposito has never provided any treatment records or Medical Source Statement from Dr. Warren, despite being given the opportunity by the ALJ and the Commissioner to do so. R. at 35. The ALJ could reasonably give less weight to Dr. Von Kiel's statement because he was not her treating physician at the time of the hearing and his opinion was no longer current.

The Court further finds that the ALJ's conclusion that Esposito's mental impairments were non-severe is based on substantial evidence. Under regulations promulgated by the Commissioner for the evaluation of mental impairments, the fact finder is required to consider medical evidence and/or laboratory or psychological test results. See 20 C.F.R. §§ 404.1520a, 416.920a. If an impairment is found, it should be analyzed under the categories listed which are

consistent with the clinical findings and the severity of the impairment should be determined by assessing the functional limitations resulting from it. See 20 C.F.R. §§ 404.1520a(b)(3), 416.920a(b)(3).

In making his determination that her mental impairments were non-severe, the ALJ completed a Psychiatric Review Technique Form and attached it to his decision. R. at 38-40. The ALJ found that Esposito suffered from depression and anxiety but that she did not have sufficient limitations caused by this depression and anxiety. The ALJ provided the following analysis for his determination that, while the combination of her physical and mental impairments were severe, the mental impairments, in and of themselves, were not severe:

Regarding the claimant's anxiety and depression, according to the record, she was never hospitalized for any emotional problems. There is no indication in the record that she was ever referred for treatment, nor that she sought counseling for her anxiety or depression. She testified that her son had been murdered during a robbery seven years ago, and both she and her daughter had received crime victim counseling at that time; however, there is no record of treatment in the file. The claimant is able to care for her personal needs and visits with friends and family, she cooks, cleans, shops, and drives a car. Based on the foregoing, the undersigned finds that the claimant does not have a severe psychological impairment.

R. at 32.

After reviewing the entire record, the Court finds that the ALJ's determination that the record does not support a finding that Esposito suffered from severe mental impairments during the period under review is supported by substantial evidence. Although the record demonstrates that Esposito was diagnosed by her physician as suffering from anxiety and depression and placed on medication to alleviate those symptoms, the mere existence of a diagnosis does not demonstrate a disability. See Plummer v. Apfel, 186 F.3d 422, 434 (3d Cir. 1999). As always, it

is the claimant's burden to demonstrate that she suffers from functional limitations as a result of that impairment. See Adorno v. Shalala, 40 F.3d 43, 46 (3d Cir. 1994); Podedworny v. Harris, 745 F.2d 210, 217 (3d Cir. 1984). Although Esposito testified that her ability to care for herself was limited by her fatigue and other physical symptoms such as her lack of leg strength, she did testify to performing, to at least some degree, the activities cited by the ALJ above. See, e.g., R. at 65, 75-76, 85. Based upon the record, the Court finds that the ALJ's determination that Esposito's mental impairments, considered alone, were non-severe is supported by substantial evidence. The Court notes, however, that even if the ALJ had erred in making this determination, it would not warrant a reversal of his decision because the ALJ determined that the combination of her physical and mental impairments, including her anxiety and depression, were severe and proceeded with the sequential analysis on the basis of all her impairments. R. at 32. Thus, Esposito suffered no prejudice from the ALJ's determination that her mental impairments were non-severe, even if such a decision were found to be incorrect.

Finally, the Court finds that the ALJ's determination that Esposito was not disabled because she could return to her past relevant work is supported by substantial evidence. Esposito attacks this determination in several ways. First, Esposito argues that the ALJ was required, under regulations promulgated by the Commissioner, to find that Esposito had CFS based on her testimony and the medical records. Second, Esposito argues that the ALJ erred in finding she could return to her past relevant work because the VE testified that she would not be able to work if Esposito's testimony concerning her limitations were to be believed. Finally, Esposito argues that the ALJ was required to find, based upon the record, that she was disabled given her age, education, work experience, and residual functional capacity.

The Court finds Esposito's contentions unsupported by the record. The record clearly establishes that the ALJ never denied that Esposito suffers from chronic fatigue syndrome. R. at 32. As previously discussed, the ALJ reviewed all of Esposito's medical complaints and found based on her chronic fatigue syndrome, fibrocystic disease, hypertension, mitral valve prolapse, headaches, anxiety, and depression that the combination of these impairments were severe because they significantly restricted Esposito's ability to perform basic work-related functions. R. at 32. However, the mere fact that Esposito has been diagnosed with chronic fatigue syndrome or that she had identifiable impairments does not, as Esposito seems to imply, mandate a finding that she is disabled. Disability is determined not by the mere presence of impairments, but rather by the functional restrictions placed on the individual by those impairments. See Jones v. Sullivan, 954 F.2d 125, 129 (3d Cir. 1991).

In determining that she could return to her past relevant work, the ALJ relied on the testimony of the VE that Esposito's past relevant work was, overall, of light exertional level. R. at 33. The ALJ stated that, in making his determination that Esposito was able to return to her past relevant work, he considered all of the medical evidence of record. R. at 33. The ALJ discussed the records from Dr. Rajeev Rohatgi concerning Esposito's cardiac symptoms, the records from Dr. Manuel Espinosa concerning Esposito's breast nodules, the records concerning Dr. Von Kiel's treatment of Esposito's other symptoms, as well as Esposito's subjective complaints. R. at 33-34. As has been previously discussed, the ALJ determined that Esposito's subjective complaints were not fully credible and also determined that Dr. Von Kiel's opinion, contained in two pre-printed forms completed on August 12, 1993, should not be given controlling weight. R. at 34. The ALJ found that neither Dr. Rohatgi's records nor Dr.



Espinosa's records suggested a basis for finding that Esposito was unable to work. R. at 33-34.

Substantial evidence exists to support the ALJ's determination that Esposito was able to return to her past relevant work and, thus, was not disabled. It was Esposito's burden, as the claimant, to produce evidence to demonstrate that she was unable to return to her past relevant work. See Adorno v. Shalala, 40 F.3d 43, 46 (3d Cir. 1994). The evidence in the record regarding Esposito's inability to return to her past relevant work consists almost entirely of her testimony concerning her subjective complaints and the two assessment forms completed by Dr. Von Kiel in 1993. The diminished weight which the ALJ properly gave to this evidence has already been discussed. On cross examination, the VE opined that Esposito would be unable to return to her past work if her testimony concerning her activities of daily living were taken at face value. R. at 89. However, the ALJ determined that Esposito's testimony concerning her subjective complaints was not fully credible and, therefore, did not rely on that testimony in making his determination that she could return to her past relevant work. In light of the record, this Court cannot say that the ALJ erred in determining that Esposito could return to her past relevant work. Having found that Esposito could return to her past relevant work and, thus, was not disabled, the ALJ had no need to proceed to step five of the sequential analysis and determine whether or not there were other jobs which Esposito could perform based on her residual functional capacity, age, education, and work experience.

### **III. CONCLUSION**

Having made a de novo review of the record, the Court has determined that ALJ Spitz's findings are supported by substantial evidence. The Court will, therefore, deny Plaintiff's motion

for summary judgment. The Court will also deny Plaintiff's alternative request that this matter be remanded to the Commissioner for consideration of new evidence relating to her psychiatric treatment beginning in July, 1997. Esposito's last insured date was March 31, 1996. Evidence of treatment which she received beginning more than one year after her last insured date is not relevant to the question of whether or not she has established that she was under a disability prior to the expiration of her last insured date. The last insured date is a statutory cut-off which precludes consideration of any new impairments which develop thereafter. See 20 C.F.R. §§ 404.101-404.132 (1999). Thus, the Court will grant Defendant's motion for summary judgment and enter judgment against Plaintiff and in favor of Defendant. The Court will approve and adopt the Report and Recommendation filed by Chief United States Magistrate Judge Melinson.

An appropriate Order follows.

**IN THE UNITED STATES DISTRICT COURT FOR  
THE EASTERN DISTRICT OF PENNSYLVANIA**

**JO ELLEN ESPOSITO**

**v.**

**KENNETH S. APFEL,  
Commissioner of the Social Security  
Administration**

**CIVIL ACTION**

**NO. 99-771**

**ORDER**

**AND NOW**, this 24th day of February, 2000; upon consideration of the parties' cross motions for summary judgment and after review of the Magistrate's January 7, 2000 Report and Recommendation and Plaintiff's objections thereto;

**IT IS ORDERED** that the January 7, 2000 Report and Recommendation of James R. Melinson, Chief United States Magistrate Judge, is **APPROVED and ADOPTED**;

**IT IS FURTHER ORDERED** that the Commissioner's Motion for Summary Judgment (Doc. No. 8) is **GRANTED**;

**IT IS FURTHER ORDERED** that Plaintiff Jo Ellen Esposito's Motion for Summary Judgment (Doc. No. 7) is **DENIED**.

---

RAYMOND J. BRODERICK, J.